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6 Attorneys for Plaintiff Chip Pierd/b/a FMP Associates

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

10 CHIP PIER, an individual d/b/a FMP
ASSOCIATES,

Plaintiff,

V

13 ARCHITECTURAL COMPONENTS
14 GROUP, INC., a Missouri corporation;
and DOES 1-10, inclusive.

Defendants

CASE No. 3:18-cv-01485-EMC

**FIRST AMENDED COMPLAINT
FOR:**

- (1) BREACH OF ORAL CONTRACT
 - (2) BREACH OF IMPLIED-IN-FACT CONTRACT
 - (3) BREACH OF WRITTEN CONTRACT
 - (4) BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING
 - (5) UNJUST ENRICHMENT
 - (6) CONSTRUCTIVE TRUST
 - (7) COMMON COUNTS
 - (8) OPEN BOOK ACCOUNT
 - (9) ACCOUNTING
 - (10) UNFAIR BUSINESS PRACTICES (BUS. & PROF. CODE § 17200)
 - (11) VIOLATION OF MISSOURI SALES COMMISSION STATUTES (MO. ST. § 407.911 *et seq.*)

DEMAND FOR JURY TRIAL

Assigned for All Purposes:
Judge Edward M. Chen
Courtroom 5

Action Filed: February 6, 2018
Removal Date: March 8, 2018
Trial Date: None

1 Plaintiff Chip Pier (a/k/a Fredrick Pier) d/b/a FMP Associates (“FMP
 2 Associates”), alleges as follows:

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ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

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6 Plaintiff Chip Pier, the individual who does business as FMP Associates,
 7 has been a resident of California and Contra Costa County at all times relevant to this
 8 action. FMP Associates, at all times relevant to this action, had its principal place of
 business at 1432 Entrada Verde, Alamo, California 94507.

9

10 Defendant Architectural Components Group, Inc. (“ACGI”) is a Missouri
 11 corporation with its principal place of business at 521 George Street, Marshfield,
 12 Missouri 65706. ACGI has done and continues to do extensive business selling into
 13 Northern California, including in this judicial district.

14

15 DOES 1 through 10 are defendants whose identities are unknown to FMP
 16 Associates at this time. FMP Associates is informed and believes that each DOE has
 17 some responsibility for the acts, omissions, and breaches alleged in this pleading and
 18 are responsible for the injuries and damages caused thereby. FMP Associates will
 19 amend its pleading to state the true names and identities of DOES 1 through 10 when
 20 ascertained (ACGI and DOES 1 through 10 referred to collectively as “Defendants”).

21

22 On information and belief each of the Defendants were at all relevant
 23 times acting to the fullest extent recognized by law as the agent, employee or co-
 24 conspirator of each of the other Defendants, and that in committing the acts and
 25 omissions alleged herein and causing the damage and injuries alleged, were acting
 26 within the scope of such agency, employment or conspiracy. The Defendants have
 27 committed acts in furtherance of the conspiracy, have given aid and encouragement to
 28 their co-conspirators and have ratified and adopted the acts of their co-conspirators.

1 5. On information and belief there exists, and at all times mentioned there
2 existed, a unity of interests and ownership between individual Defendants and business
3 entity defendants such that any individuality and separateness between the individual
4 and businesses never existed or has ceased to exist, and each Defendant is in each
5 instance the alter ego of the other Defendants who control all such entities. To adhere
6 to the fiction of the Defendant entities as having existence as separate and distinct from
7 the individual Defendants or from those with them and who owned and controlled them
8 would permit an abuse of the corporate and other entity privileges, would sanction
9 fraud, and would promote injustice.

JURISDICTION AND VENUE

12 6. This action arises under and this Court has original jurisdiction pursuant to
13 28 U.S.C. 1332 (diversity).

15 7. Venue is proper in this district under 28 U.S.C. § 1391(b)(2) because a
16 substantial part of the events giving rise to the claims occurred in this judicial district,
17 and because ACGI is subject to the Court’s personal jurisdiction with respect to this
18 action. 28 U.S.C. § 1391(c)(2).

FACTUAL ALLEGATIONS

Background

22 8. ACGI, founded in 2001, is a manufacturer of wood walls and wood ceiling
23 systems, including microperforated acoustical wood panels, used in a variety of
24 applications in buildings across the country, including in Northern California and this
25 judicial district.

27 9. In or about 2008 or 2009, FMP Associates agreed to become an
28 independent wholesale sales representative for ACGI, soliciting orders for, marketing,

1 and expanding the sale of ACGI's product lines in Northern California (*i.e.* from the
2 California-Oregon border south to and including Fresno, California). FMP Associates
3 has significant experience in the types of wall and ceiling systems manufactured and
4 sold by ACGI, along with many contacts with architects and contractors in the Northern
5 California area.

6

7

The Agreement

8 10. The pertinent terms of the independent sales representative agreement
9 ("Agreement") between FMP Associates and ACGI are as follow:

10

11 (a) FMP Associates is the exclusive ACGI representative for the
12 Northern California territory, as defined above.

13

14 (b) When ACGI sells a project located within the Northern California
15 territory, FMP Associates receives a 2.5% commission (referred to by the parties as
16 "Territory Credit"), regardless of FMP Associates' participation in the project.

17

18 (c) When a project architect is located within the Northern California
19 territory (regardless of the location of the project), FMP Associates receives a 5%
20 commission (referred to by the parties as "Spec Credit"), regardless of FMP Associates'
21 participation in the project.

22

23 (d) When a project contractor is located within the Northern California
24 territory (regardless of the location of the project), FMP Associates receives a 2.5%
25 commission (referred to by the parties as "Contractor Credit"), regardless of FMP
26 Associates' participation in the project.

27

28

(e) As such, FMP Associates is entitled to receive up to a 10% commission for projects with a nexus to its territory pursuant to the cumulative factors described in Paragraphs 10(b)-(d). A full 10% commission comprised of all three different “Credits” is referred to by the parties as a “Commission.”

6 (f) Commissions become due on final project payment.

8 11. Consistent with these terms, FMP Associates represented ACGI on a wide
9 number of projects over the years, receiving “Credits” and “Commissions” related to
10 projects, architects, and/or contractors located in the Northern California territory.

12 12. On a case-by-case basis, FMP Associates could specifically agree to an
13 adjustment from the commission rates in Paragraphs 10(b)-(e).

The Apple Campus Project

13. In or around 2012, FMP Associates met with Foster + Partners, an
14 architectural firm with offices in Cupertino, California that was soliciting manufacture
15 of micro-perforated wood panels for the planned Apple Campus in Cupertino (located
16 within this judicial district), a significant project both in terms of size and prestige.
17 FMP Associates discussed project specifications with Foster + Partners, provided
18 sample products, pitched the project to ACGI, and connected Foster + Partners with
19 ACGI. FMP Associates was involved with and copied on communications between
20 Foster + Partners, contractors, and ACGI regarding the Apple Campus project.

25 14. ACGI was ultimately selected to manufacture the micro-perforated wood
26 panels for the Apple Campus project, an approximately 2.8 million square-foot
27 building. Upon information and belief, the estimated contract amount for the Apple
28 Campus project was \$20,000,000. Upon information and belief, construction did not

begin until late 2013 or early 2014 and continued into 2017. Upon information and belief, the Apple Campus project was not fully paid by Apple to ACGI until 2016 or later.

5 15. FMP Associates procured the Apple Campus project for ACGI. The
6 Apple Campus project and the architect were located in FMP Associates' exclusive
7 territory, and the contractor was located outside FMP Associates' territory. As such,
8 FMP Associates is owed a 7.5% commission for the Apple Campus project, which on
9 information and belief totals at least \$1,500,000.

16. Instead of paying commissions to FMP Associates on the Apple Campus
project as required under the Agreement, ACGI characterized an initial payment of
\$10,000 as a “finder’s fee” and said no commissions would be forthcoming. FMP
Associates did not accept this proposed characterization or limitation, and in
communications well into 2017 ACGI appeared to accept that commissions were owed
to FMP Associates for the Apple Campus project and stated repeatedly that
commissions and commission reports would be furnished. Indeed, in checks that
referred to the payments as “Apple Commission,” ACGI made \$90,000 of additional
partial payments of Apple Campus commissions into 2017.

21 17. ACGI has not paid the remainder of the Apple Campus commission owed
22 to FMP Associates, which on information and belief totals at least \$1,400,000.

Additional Apple Projects

18. From 2012 onward, FMP Associates performed similar representative
work for and was involved in communications for additional Apple micro-perforated
wood panel projects, including the Apple Campus Fitness Center, the Apple Campus
Visitors Center, the Apple Campus Transit Center, and others. These projects were in

1 FMP Associates' exclusive Northern California territory and involved contractors and
2 architects within the exclusive territory. As such, FMP Associates is owed a 10%
3 commission for the additional Apple projects. Upon information and belief, the
4 estimated contract amount for these additional Apple projects was \$3,800,000 or
5 greater. Upon information and belief, these additional Apple projects were not fully
6 paid by Apple until 2016 or later.

7

8 19. In 2016, in a check that referred to the payment as “First commission on
9 Apple Fitness,” ACGI made a partial payment of \$2,500 in commissions owed to FMP
10 Associates on these additional Apple projects. ACGI has not paid the remainder of the
11 commissions owed on the additional Apple projects, which on information and belief
12 total at least \$377,500.

13

14 20. On information and belief, FMP Associates is owed approximately
15 \$1,777,500 or greater in commissions for the sold Apple projects in their entirety.

16

The Termination

18 21. On February 19, 2018, counsel for ACGI gave notice that FMP Associates
19 was terminated as an independent sales representative for ACGI. FMP Associates had,
20 up until the date of termination, been regularly procuring sales for ACGI.

21

22 22. Upon receiving notice of termination, FMP Associates, via its counsel of
23 record, requested that ACGI provide all outstanding commission reports and make
24 payment of all outstanding commissions. As of the filing of this Amended Complaint,
25 ACGI has neither provided the commission reports nor paid any further commissions.

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**FIRST CAUSE OF ACTION
FOR BREACH OF ORAL CONTRACT
AGAINST DEFENDANT ACGI**

23. FMP Associates realleges and incorporates by reference Paragraphs 1 through 22, above.

24. FMP Associates and ACGI entered into the Agreement, pertinent provisions of which are described in Paragraphs 10(a)-(f).

10 25. FMP Associates performed all conditions, covenants, and promises
11 required on its part to be performed in accordance with the terms of the Agreement,
12 other to the extent excused, waived, or prevented by ACGI from so performing.

14 26. ACGI has partially performed under the Agreement, among other ways, by
15 causing partial commissions to be paid to FMP Associates for some of the Apple-
16 related projects referenced above.

18 27. ACGI breached the Agreement, among other ways, by failing to pay all
19 amounts owed to FMP Associates under the Agreement, including but not limited to as
20 relates to the Apple projects.

22 28. As a result of ACGI's breaches of the Agreement, FMP Associates has
23 suffered damages in an approximate amount of \$1,777,500 or greater, subject to proof
24 at trial.

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**SECOND CAUSE OF ACTION
FOR BREACH OF IMPLIED-IN-FACT CONTRACT
AGAINST DEFENDANT ACGI**

29. FMP Associates realleges and incorporates by reference Paragraphs 1 through 22, above.

30. FMP Associates and ACGI entered into the Agreement, pertinent provisions of which are described in Paragraphs 10(a)-(f).

31. FMP Associates performed all conditions, covenants, and promises required on its part to be performed in accordance with the terms of the Agreement, other to the extent excused, waived, or prevented by ACGI from so performing.

32. ACGI has partially performed under the Agreement, among other ways, by causing partial commissions to be paid to FMP Associates for some of the Apple-related projects referenced above.

33. ACGI breached the Agreement, among other ways, by failing to pay all amounts owed to FMP Associates under the Agreement, including but not limited to as relates to the Apple projects.

34. As a result of ACGI's breaches of the Agreement, FMP Associates has suffered damages in an approximate amount of \$1,777,500 or greater, subject to proof at trial.

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**THIRD CAUSE OF ACTION
FOR BREACH OF WRITTEN CONTRACT
AGAINST DEFENDANT ACGI**

35. FMP Associates realleges and incorporates by reference Paragraphs 1 through 22, above.

36. FMP Associates and ACGI entered into the Agreement, pertinent provisions of which are described in Paragraphs 10(a)-(f).

37. On information and belief, there are writings between the parties that are sufficient to constitute a memorandum of the parties' Agreement.

38. FMP Associates performed all conditions, covenants, and promises required on its part to be performed in accordance with the terms of the Agreement, other to the extent excused, waived, or prevented by ACGI from so performing.

39. ACGI has partially performed under the Agreement, among other ways, by causing partial commissions to be paid to FMP Associates for some of the Apple-related projects referenced above.

40. ACGI breached the Agreement, among other ways, by failing to pay all amounts owed to FMP Associates under the Agreement, including but not limited to as relates to the Apple projects.

41. As a result of ACGI's breaches of the Agreement, FMP Associates has suffered damages in an approximate amount of \$1,777,500 or greater, subject to proof at trial.

**FOURTH CAUSE OF ACTION
FOR BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING
AGAINST ALL DEFENDANTS**

42. FMP Associates realleges and incorporates by reference Paragraphs 1 through 22, above.

43. The parties entered into the Agreement, the terms of which included an implied covenant of good faith and fair dealing by which each of the parties agreed not to act in a manner so as to deny the benefits of the Agreement to the other.

44. FMP Associates performed all conditions, covenants, and promises required on its part to be performed in accordance with the terms of the Agreement, other to the extent excused, waived, or prevented by ACGI from so performing.

45. ACGI has partially performed under the Agreement, among other ways, by causing partial commissions to be paid to FMP Associates for some of the Apple-related projects referenced above.

46. ACGI breached the Agreement, among other ways, by denying commissions owed to FMP Associates under the Agreement, and instead asserting that FMP Associates is only owed some lesser “finder’s fee.”

47. As a result of ACGI's breaches of the Agreement and Defendants' breach of their implied obligation of good faith and fair dealing, FMP Associates has suffered damages in an approximate amount of \$1,777,500 or greater, subject to proof at trial.

1 **FIFTH CAUSE OF ACTION**
2 **FOR UNJUST ENRICHMENT**
3 **AGAINST ALL DEFENDANTS**

4 48. FMP Associates realleges and incorporates by reference Paragraphs 1
5 through 22, above.

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7 49. Defendants have been unjustly enriched by taking the benefits of FMP
8 Associates' performance under the Agreement, while denying to FMP Associates fair
9 compensation for its services.

10

11 50. FMP Associates is entitled to recover the value of its services to
12 Defendants, in an approximate amount of \$1,777,500 or greater, according to proof at
13 trial.

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15 **SIXTH CAUSE OF ACTION**
16 **FOR CONSTRUCTIVE TRUST**
17 **AGAINST ALL DEFENDANTS**

18 51. FMP Associates realleges and incorporates by reference Paragraphs 1
19 through 22, above.

20

21 52. FMP Associates has an interest in certain personal property in the
22 possession or control of Defendants, namely commissions earned pursuant to the
23 Agreement but wrongfully withheld by Defendants.

24

25 53. By virtue of their wrongful acts, Defendants hold the property as
26 constructive trustees for FMP Associates' benefit.

1 54. FMP Associates is unsure of the amount that Defendants hold in
2 constructive trust for FMP Associates, but on information and belief it is in the
3 approximate amount of \$1,777,500 or greater. Defendants are uniquely in possession
4 and control of the information required to establish the amount held by Defendants in
5 constructive trust, and an accounting is necessary to determine the amount.

**SEVENTH CAUSE OF ACTION
FOR COMMON COUNTS
AGAINST ALL DEFENDANTS**

10 55. FMP Associates realleges and incorporates by reference Paragraphs 1
11 through 22, above.

13 56. Defendants have become indebted to FMP Associates in an amount equal
14 to the reasonable value of the services provided by FMP Associates for the benefit of
15 one or more of the Defendants.

17 57. FMP Associates has repeatedly demanded payment of the amounts due,
18 but Defendants have refused to pay such amounts due to FMP Associates.

20 58. As a result of Defendants' failure to pay amounts due to FMP Associates,
21 FMP Associates has suffered damages in an approximate amount of \$1,777,500 or
22 greater, subject to proof at trial.

**EIGHTH CAUSE OF ACTION
FOR OPEN BOOK ACCOUNT
AGAINST ALL DEFENDANTS**

27 59. FMP Associates realleges and incorporates by reference Paragraphs 1
28 through 22, above.

60. FMP Associates and ACGI entered into business transactions in which commissions were earned by FMP Associates and payable by ACGI.

61. On information and belief, ACGI kept an open book account relating to
the transactions between FMP Associates and ACGI.

62. ACGI is indebted to and owes FMP Associates an approximate amount of \$1,777,500 or greater on the account, subject to proof at trial.

**NINTH CAUSE OF ACTION
FOR ACCOUNTING
AGAINST ALL DEFENDANTS**

13 63. FMP Associates realleges and incorporates by reference Paragraphs 1
14 through 22, above.

16 64. Defendants owe FMP Associates commissions earned pursuant to the
17 Agreement but wrongfully withheld by Defendants.

19 65. FMP Associates is unsure of the exact amount that Defendants owe to
20 FMP Associates, because Defendants are uniquely in possession and control of the
21 information required to establish the amount owed by Defendants. An accounting is
22 necessary to determine the exact amount owed by Defendants. However, FMP
23 Associates is informed and believes it is owed commissions in an approximate amount
24 of \$1,777,500 or greater.

26 66. FMP Associates is entitled to a full accounting by Defendants of all
27 financial information necessary to determine the complete amount of commissions
28 owed to FMP Associates.

**TENTH CAUSE OF ACTION
FOR UNFAIR BUSINESS PRACTICES
AGAINST ALL DEFENDANTS**

67. FMP Associates realleges and incorporates by reference Paragraphs 1 through 22, above.

68. Defendants' acts constituted business practices that were unlawful, unfair and fraudulent toward FMP Associates, which acts constitute unfair competition within the prohibitions of California Business and Professions Code section 17200 *et seq.*

69. FMP Associates is entitled to restitution of the commissions to which it was and is entitled to immediate possession and ownership.

**ELEVENTH CAUSE OF ACTION
FOR VIOLATION OF MISSOURI SALES COMMISSION STATUTES
AGAINST ALL DEFENDANTS**

70. FMP Associates realleges and incorporates by reference Paragraphs 1 through 22, above.

71. ACGI, a Missouri corporation with headquarters and manufacturing in Missouri, is a “principal” as defined in Mo. St. § 407.911(2).

72. FMP Associates is a “sales representative” as defined in Mo. St. § 407.911(3).

73. ACGI agreed to pay and paid FMP Associates in “commissions” as defined in Mo. St. § 407.911(1).

1 74. Pursuant to the parties' agreement as referenced in Paragraph 10(f), above,
2 commissions to FMP Associates become due on final project payment. In the
3 alternative, pursuant to Mo. St. § 407.912.1(2), commissions to FMP Associates are
4 due on the date a particular product is delivered and accepted by the purchaser, or on
5 the date the principal receives satisfaction in full for such project.

6

7 75. Pursuant to Mo. St. § 407.912.2, regardless of ACGI's termination of FMP
8 Associates, FMP Associates is still owed commissions on products or services ordered
9 prior to the termination but delivered and accepted by the various purchasers after such
10 termination.

11

12 76. Pursuant to Mo. St. § 407.912.3, all commissions due prior to termination
13 of the sales representative are to be paid within 30 days of termination. All
14 commissions which become due after the termination are to be paid within 30 days of
15 becoming due. Further, a sales representative may not be denied commissions on
16 products ordered prior to the termination but delivered and accepted after the
17 termination; such commissions are "earned" pursuant to the Missouri Sales
18 Commission Statutes.

19

20 77. As of the filing of this Amended Complaint, more than 30 days have
21 elapsed since the February 19, 2018 termination and, despite FMP Associates' specific
22 requests for payment, ACGI has paid no earned or due commissions to FMP Associates
23 since the termination, including but not limited to the commissions owed in connection
24 with the Apple Projects.

25

26 78. For its failure and continuing failure to pay commissions due and owing to
27 FMP Associates, ACGI is in violation of the Missouri Sales Commission Statutes (Mo.
28 St. § 407.911 *et seq.*). Pursuant to Mo. St. § 407.913, any principal who fails to timely

1 pay the sales representative commissions earned by such sales representative shall be
2 liable to the sales representative in a civil action for the actual damages sustained by the
3 sales representative, and an additional amount as if the sales representative were still
4 earning commissions calculated on an annualized pro rata basis from the date of
5 termination to the date of payment. In addition the court may award reasonable
6 attorneys' fees and costs to the prevailing party.

7

8 79. As a result of ACGI's violations of the Missouri Sales Commission
9 Statutes, FMP Associates has suffered damages in at least an approximate amount of
10 \$1,777,500 or greater, subject to proof at trial, plus additional statutory damages and
11 fees as specified in Mo. St. § 407.913, subject to proof at trial.

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PRAYER

14 **WHEREFORE**, FMP Associates prays for relief as follows:

15 1. For compensatory damages and interest in an amount according to proof at
16 trial;

17 2. For restitution of all funds acquired by means of any act or practice
18 determined to be unlawful, unfair, or fraudulent according to proof at trial;

19 3. For a constructive trust on monies due FMP Associates;

20 4. For an accounting;

21 5. For costs incurred;

22 6. For an amount as if FMP Associates was still earning commissions
23 calculated on an annualized pro rata basis from the date of termination to the date of
24 payment, pursuant to Mo. St. § 407.913;

25 7. For attorneys' fees; and

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8. For such other and further relief as deemed just and proper by the Court.

Dated: March 23, 2018

Evan Pitchford
Eric S. Engel, members of
CONKLE, KREMER & ENGEL
Professional Law Corporation

By: /s/ Evan Pitchford

Evan Pitchford
Attorneys for Plaintiff Chip Pier
d/b/a FMP Associates

1 **DEMAND FOR JURY TRIAL**
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3 Plaintiff Chip Pier d/b/a FMP Associates hereby demands a trial by jury of all
4 triable issues.

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6 Dated: March 23, 2018

Evan Pitchford
Eric S. Engel, members of
CONKLE, KREMER & ENGEL
Professional Law Corporation

7
8 By: /s/ Evan Pitchford
9

Evan Pitchford
10 Attorneys for Plaintiff Chip Pier
11 d/b/a FMP Associates

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1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 At the time of service, I was over 18 years of age and **not a party to this action.**
4 I am employed in the County of Los Angeles, State of California. My business address
5 is 3130 Wilshire Boulevard, Suite 500, Santa Monica, California 90403-2351.

6 On March 23, 2018, I served true copies of the following document(s) described
7 as **FIRST AMENDED COMPLAINT** on the interested parties in this action as
8 follows:

9 Jonathan R. Doolittle (SBN 290638)
Matthew T. Peters (SBN 256739)
10 **REED SMITH LLP**
101 Second Street, Suite 1800
San Francisco, CA 94105-3659

11 (415) 543 8700 Telephone
(415) 391 8269 Facsimile

12 Attorneys for Defendant
Architectural Components Group, Inc.

13 **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I caused said
document(s) to be served by means of this Court's electronic transmission of the Notice
of Electronic Filing through the Court's transmission facilities, to the parties and/or
counsel who are registered CM/ECF Users set forth in the service list obtained from
this Court.

16 I declare under penalty of perjury under the laws of the United States of America
that the foregoing is true and correct and that I am employed in the office of a member
of the bar of this Court at whose direction the service was made.

18 Executed on March 23, 2018, at Santa Monica, California.

20 */s/ Felicia Ball*

21 _____
Felicia Ball

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